

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR KENT COUNTY

KEVIN MOORE,)	
)	C.A. No. 08C-11-025 JTV
Plaintiff,)	
)	
v.)	
)	
SGT. MATTHEW LONG,)	
)	
Defendant.)	

Submitted: December 7, 2009

Decided: March 31, 2010

Stephen A. Hampton, Esq., Grady & Hampton, Dover, Delaware, and Umbreen Bhatti, Esq., ACLU, Wilmington, Delaware. Attorneys for Plaintiff.

Mark P. Niedzielski, Esq., Department of Justice, Wilmington, Delaware.
Attorney for Defendant.

*Upon Consideration of Defendant's
Motion For Summary Judgment*

DENIED

VAUGHN, President Judge

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OPINION

At the time of the event which gives rise to this lawsuit, the plaintiff, Kevin Moore, was an inmate in a Delaware state prison. He alleges that the defendant, correctional officer Matthew Long, kicked him in the ankle, causing injury. He alleges causes of action under 42 U.S.C. § 1983 and state tort law. The defendant has moved for summary judgment.

FACTS

On November 23, 2006, the plaintiff was incarcerated at the Sussex County Violation of Probation Center in Georgetown, Delaware. He and his fellow inmates allegedly disobeyed a facility rule that prohibited talking after the “lights-out” time of 9 p.m. As a consequence, the plaintiff and others were led to “the footprints” in the facility’s staging area, where a series of yellow footprints are painted on the ground. Inmates are instructed to stand on these footprints for discipline purposes.

Prior to entering the area where the footprints were located, each inmate was shackled together with another inmate.¹ The plaintiff alleges that while he was being shackled in the holding area, he informed the correctional officer applying the shackles that he had recently suffered an injury to his right ankle; specifically, that he had “rods and plates in his ankle.”² The correctional officer that placed the shackles on the plaintiff was not the defendant. Once all the inmates were shackled,

¹ In Moore’s case, the shackle was placed on his left leg.

² Pl. Mot., Ex. 1 (Moore Dep. Tr. 26). Moore had recently suffered a significant injury to his right ankle that required some reconstruction, though it is unclear from the record when that injury occurred.

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they were led to the footprints.

What happened at “the footprints” was recorded by video surveillance. The video, along with parties’ deposition testimony and some limited documentary evidence, forms the record of this case.³

The plaintiff positioned himself on the footsteps that were the furthest to the front and right, placing him squarely in view of the camera. The video shows the plaintiff standing in that location, facing forward most of the time, occasionally rotating his torso or fidgeting, and perhaps talking to other inmates. He was standing in a way which suggested that most of his weight was placed on his left foot. His right foot was raised in the air most of the time, so it rarely made contact with the footprint on which it was supposed to rest. His left foot, however, never left its proper place on the footprint.

It took approximately five minutes for all of the inmates to get settled into their positions on the footprints. The inmates were standing in three lines of six or seven. Once all of the inmates were positioned correctly, the defendant walked around the group, starting opposite of the plaintiff’s location. He appeared to be inspecting the entire group of inmates. After rounding the back row, the defendant approached the plaintiff from the side and rear, with the plaintiff looking forward and his back toward the defendant. What occurred next is unclear in the video, and is a matter of dispute

³ The video accompanied Sgt. Long’s courtesy copy of his motion. Video-capture is essentially the conversion of video from analog to digital format. The video is of poor quality; it is slightly blurred, difficult to operate, plays at a frame-rate slightly slower than normal speed, and lacks sound. It does, however, visually capture most of the key events.

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between the parties.

It appears that the plaintiff was still in his same position; facing forward with his left foot on a footprint and his right foot slightly raised. The defendant approached him from the rear. It appears that the defendant's head changed positions, first looking down at the plaintiff's feet then back up at the plaintiff's torso and head. As the defendant approached to within a few feet of the plaintiff, the defendant's head was cocked at an angle which suggests that he was once again looking at the plaintiff's feet.

When the defendant came within a foot of the plaintiff, he placed his left foot directly next to the plaintiff's right foot. The defendant then slightly cocked his right leg, bent his knee, and swung his right foot towards the plaintiff's right foot. As the defendant's leg swung toward the plaintiff, it appears that the defendant shifted his weight to correspond with the motion of his leg. The inside of the defendant's foot made contact with the outside of the plaintiff's right foot and lower ankle. The plaintiff reacted by withdrawing his foot a few inches. Immediately following the contact, the two parties appeared to exchange words. As the parties talked, the plaintiff had his right foot raised in the air, moving it back and forth slightly, flexing his ankle.

The plaintiff claims that he informed the defendant of the injury to his right ankle before the defendant made contact with the plaintiff's right foot and ankle.⁴ In his deposition, the plaintiff stated that the defendant had said to him, "Put your foot

⁴ Pl. Mot., at 2; Compl. ¶ 7.

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back down on the footprint,” to which the plaintiff responded, “I got rods and plates in there.”⁵ The plaintiff claims that the defendant then “kick[ed]” him,⁶ and a verbal confrontation followed, wherein the defendant said, “I don’t care about that.”⁷ There seems to be some inconsistency in the plaintiff’s deposition, however, because another part of the plaintiff’s deposition suggests that he did not tell the defendant of his pre-existing injury until after the physical contact.⁸ According to the plaintiff’s complaint, after the defendant kicked him, the defendant told him that “if he said another word, he would spray [the plaintiff] with mace.”⁹

In his motion, the defendant characterized his encounter with the plaintiff as follows:

The video shows defendant Long coming around the rear of the inmates and approaching [Moore] from his right rear. As Long approaches Moore, his right foot comes in contact with the outside of Moore’s right shoe to move Moore’s foot to the painted footprint. After the contact there is a discussion between [Moore] and [Long].¹⁰

The defendant prepared two reports regarding the incident. His first report describes

⁵ Pl. Mot. Ex. 1 (Moore Dep. Tr. at 27-28).

⁶ *Id.*

⁷ *Id.*

⁸ Def. Mot. Ex. 1 (Moore Dep. Tr. at 79).

⁹ Compl. ¶ 7.

¹⁰ Def. Mot. at 2.

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the events, in pertinent part, as follows:

[I] observed [Moore] turned around looking and laughing with the offenders standing behind him. I addressed [Moore] and told him to turn around and that there was no talking on the footprints. Approx[imately] five minutes later [Moore] stated that he could not [complete the discipline exercise] because he had a broken ankle [Moore] was then taken to medical to be examined, and the determination was made that it would not be a good idea to have [Moore] do the [discipline exercise].¹¹

After an investigation was conducted by the defendant's supervisors, the defendant filed an additional report, wherein he stated:

After reviewing my initial report . . . I realize that there are facts that need to be clarified. After telling [the plaintiff] to turn around and stop talking, I used my foot to slide his foot into the proper position on the footprints. [The plaintiff] did not indicate he was in pain. It was not until after repositioning his foot, that [the plaintiff] stated that he had a prior injury to his ankle.¹²

I now return to the remaining facts of the case. A few minutes after the physical contact had occurred, and just before the group of inmates were dismissed, the plaintiff raised his hand a few times, seemingly in an attempt to get attention. Each time he raised his hand, he looked at his feet. After all of the inmates were dismissed, the plaintiff and the inmate who was shackled to him remained in their position. The inmate secured to the plaintiff waived his hand at a group of four

¹¹ Pl. Mot., Ex. 5 at 1.

¹² Pl. Mot., Ex. 7.

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correctional officers. After it appeared that some words were exchanged, the plaintiff gestured at his right foot a few times and hopped around a bit. A correctional officer then came over and unlocked the shackles. Finally, the plaintiff limped his way back to the holding area and out of view of the surveillance camera. The video ends shortly thereafter.

Immediately following the encounter with the defendant, the plaintiff was seen by the facility's medical staff and given crutches. Several weeks later, the plaintiff was seen by a doctor, who noted aggravation to the plaintiff's prior injury and discovered a broken surgical screw in an x-ray of the plaintiff's lower leg.¹³

CONTENTIONS

The defendant contends that he is entitled to summary judgment. He contends that "[i]t is now undisputed that [he] was not aware of [the plaintiff's] prior ankle injury until after the contact between [them]," and "[t]he video is clear that there was no effort to injure [the plaintiff], but to correct his stance."¹⁴ He contends that the plaintiff does not have a viable § 1983 claim because undisputed facts show that "the minor contact" between the parties was "intended to be corrective, and not to inflict pain or injury."¹⁵ He also contends that a justification defense described in 11 *Del. C.* § 468(5) shields him from liability for the plaintiff's state law tort claims. Finally, he contends that there was insufficient service of process, arguing that the plaintiff

¹³ Pl. Mot., Ex. 3.

¹⁴ Def. Mot. at 2.

¹⁵ Def. Mot. at 3.

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failed to comply with 10 *Del. C.* § 3103(c).

The plaintiff contends that the parties' contradictory deposition testimony creates genuine issues of material fact. Regarding his § 1983 claim, he contends that whether the defendant used excessive force is a genuine issue of material fact that remains in dispute. He also contends that his state law tort claims are viable and that the facts do not show that the defendant can assert the justification defense in 11 *Del. C.* § 468(5). Finally, concerning the defendant's sufficiency of process argument, the plaintiff contends that; one, 10 *Del. C.* § 3103(c) does not apply to the defendant; and two, if it does, then the plaintiff should be granted an opportunity to correct service.

STANDARD OF REVIEW

Summary judgment should be granted when there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law.¹⁶ In considering the motion, I "must view the evidence in the light most favorable to the non-moving party. This means [I] will accept as established all undisputed factual assertions, made by either party, and accept the non-movant's version of any disputed facts."¹⁷ Summary judgment is inappropriate when the record reasonably indicates that a material fact is in dispute or if it seems desirable to inquire more thoroughly into the facts in order to clarify the application of law to the circumstances.¹⁸ The

¹⁶ Super. Ct. Civ. R. 56(c).

¹⁷ *Merrill v. Crothall-American, Inc.*, 606 A.2d 96, 99-100 (Del. 1992).

¹⁸ *Mumford & Miller Concrete, Inc. v. New Castle County*, 2007 WL 404771, at *1 (Del. Super.).

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moving party is not entitled to summary judgment on a particular issue if enough evidence exists to enable a jury to reasonably find for the non-movant on that issue.¹⁹

DISCUSSION

The plaintiff's § 1983 claim alleges that the defendant's use of force was cruel and unusual punishment under Eighth Amendment of the United States Constitution.²⁰ "In its prohibition of 'cruel and unusual punishment,' the Eighth Amendment places restraints on prison officials who may not use excessive physical force against prisoners."²¹ Not every government action that affects a prisoner's well-being is subject to scrutiny.²² For the conduct to be prohibited, it "must involve more than ordinary lack of due care for the prisoner's interests of safety."²³ Further, "the infliction of pain in the course of a prison security measure" does not rise to the level of unconstitutional conduct even if, in retrospect, it was unreasonable.²⁴ "Deference is given to prison officials' adoption and execution of policies to preserve internal

¹⁹ *Bradley v. AC & S Co.*, 1989 WL 112727, at *1 (Del. Super.) (citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986)).

²⁰ Section 1983 actions may be brought in state court. *Maine v. Thiboutot*, 448 U.S. 1, 3 n.1 (1980); *Kerns v. Dukes*, 707 A.2d 363, 367 (Del. 1998).

²¹ *Dickens v. Brewington-Carr*, 1999 WL 1240910, at *3 (Del. Super.) (citing *Farmer v. Brennan*, 511 U.S. 825, 831 (1994)).

²² *Whitley v. Albers*, 475 U.S. 312, 319 (1986).

²³ *Id.*

²⁴ *Id.*

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order, discipline, and security.”²⁵ However, the “unnecessary and wanton infliction of pain” constitutes cruel and unusual punishment.²⁶

The test for an excessive force claim is “whether force was applied in a good faith effort to maintain or restore discipline or maliciously and sadistically for the very purpose of causing harm.”²⁷ The United States Supreme Court has set forth five factors for a court to consider:

- (1) The need for the application of force;
- (2) The relationship between the need and the amount of force that was used;
- (3) The extent of the injury inflicted;
- (4) The extent of the threat to the safety of staff and inmates, as reasonably perceived by the responsible officials on the basis of the facts known to them; and
- (5) Any efforts made to temper the severity of the forceful response.²⁸

When the facts of this case are viewed in the context of the applicable legal standard, it is apparent that there are genuine issues of material fact. Sufficient evidence exists to enable a jury, if it accepted the plaintiff’s version of the facts viewed in the light most favorable to the plaintiff, to conclude that the defendant’s use of force was not “applied in a good faith effort to maintain or restore discipline,” but was instead done “maliciously and sadistically for the very purpose of causing

²⁵ *Giles v. Kearney*, 571 F.3d 318, 328 (3d Cir. 2009).

²⁶ *Estelle v. Gamble*, 497 U.S. 97, 103 (1976).

²⁷ *Giles*, 571 F.3d at 326 (citing *Whitley*, 475 U.S. at 319).

²⁸ *Id.*

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harm.” Accordingly, the defendant’s motion for summary judgment on the plaintiff’s § 1983 claim must be denied.

Turning to the plaintiff’s state tort claims, the defendant argues that he is entitled to summary judgment on the grounds that he was justified in his actions. He cites 11 *Del. C.* § 468 which reads, in pertinent part:

The use of force upon or toward the person of another is justifiable if it is reasonable and moderate and:

The defendant is a[n] . . . authorized official of a correctional institution, . . . , and:

- (a) The defendant believes that the force used is necessary for the purpose of enforcing the lawful rules or procedures of the institution; and
- (b) The nature or degree of force used is not forbidden by any statute governing the administration of the institution.

For purposes of this motion, I assume *arguendo* that this precise defense from the criminal code is applicable in a civil case, and that the defendant’s belief under subsection (a) is his subjective belief. I have concluded that jury questions exist as to whether the force used was reasonable and moderate, and as to the defendant’s credibility concerning his belief.

Finally, the defendant challenges the sufficiency of service of process.²⁹ He

²⁹ Sgt. Long preserved this defense by raising it in his Answer as an affirmative defense. Answer ¶ 20. See *Gaddow v. Parker*, 865 A.2d 515, 519-520 (Del. 2005).

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contends that the plaintiff was required to comply with 10 *Del. C.* § 3103(c).

Section § 3103(c) reads:

No service of summons upon the State, or upon any administrative office, agency, department, board or commission of the state government, or upon any officer of the state government concerning any matter arising in connection with the exercise of his or her official powers or duties, shall be complete until such service is made upon the person of the Attorney General or upon the person of the State Solicitor or upon the person of the Chief Deputy Attorney General.

The question presented here is whether the defendant is an “officer of the state government,” as that phrase is used in § 3103(c).

The plaintiff contends that he was not required to comply with that statute and, in the alternative, requests an enlargement of time to correct service of process if § 3103(c) does in fact apply. The plaintiff contends that the defendant is not an officer of the state government under § 3103(c) because: he is the sole defendant (the State, Department of Correction, the warden, etc. were not sued); he is an employee, not an officer; his action “had no legitimate penological interest”; and his action was not required by his official duties.³⁰ The defendant contends that he is an officer of the state government under § 3103(c).³¹ Neither party cites any authority to support their respective positions. For the following reasons, I conclude that Moore was required to comply with § 3103(c), and that Moore will be provided an enlargement of time

³⁰ Pl. Mot., at 3-4; Pl. Ltr. at 2.

³¹ Def. Mot. at 4.

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to perfect service of process.

It appears to be the practice of Delaware's Federal District Court to require compliance with § 3103(c) in factually similar cases.³² Rather than endeavor to arrive at a definitive definition of the word "officer" as intended by the statute, I have decided to follow the practice of the district court. Therefore, service under § 3103(c) must be completed.

An enlargement of time may be granted for a party to comply with a specified time limit contained in a court rule.³³ I have concluded that the plaintiff was required to follow § 3103(c) in order to comply with the 120 day time limit for service of summons under Rule 4(j). I find, however, that the plaintiff's failure to comply with Rule 4(j) was due to excusable neglect.³⁴ Therefore, I grant the plaintiff a 60 day

³² See *Page v. Forry*, 2009 WL 3109828, at *3 (D. Del.) (ordering a prisoner-plaintiff to serve, pursuant to § 3103(c), two Delaware Department of Correction home confinement officers); *Rainier v. Smith*, 2009 WL 3060363, at *5 (D. Del.) (ordering a prisoner-plaintiff to serve, pursuant to § 3103(c), four correctional officers); see *Carmean v. Jensen*, 2004 WL 2127052, at *2 (D. Del.) (dismissing a prisoner-plaintiff's suit against four correctional officers and a warden for, *inter alia*, failing to comply with § 3103(c)). The Delaware Superior Court has also followed this practice. See *Deputy v. Conlan*, 2008 WL 2690298, at *1 (Del. Super.).

³³ Super. Ct. Civ. R. 6(b).

³⁴ In particular, I find that the plaintiff's position that he was not required to comply with § 3103(c) was a reasonable legal position based on the few and conflicting cases that have considered the applicability of that subsection. Compare footnote 41, *supra*, with *Briscoe v. Hardy*, 1981 WL 377637, at *1 (Del. Super.) (holding that § 3103(c) was not applicable to a teacher's aide employed by the Department of Correction). Also, I am comforted by the fact that the defendant has suffered no discernable prejudice due to the plaintiff's failure to comply with § 3103(c). The defendant was personally served with process four business days after the complaint was filed, and he has been ably represented by the Department of Justice throughout the litigation.

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enlargement of time from the date hereof to complete service of process in accordance with § 3103(c).

CONCLUSION

For the foregoing reasons, the defendant's Motion For Summary Judgment is ***denied.***

IT IS SO ORDERED.

/s/ James T. Vaughn, Jr.

President Judge

JTVJr:dfm

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